ORIGINAL

NO. 83-5939

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HORACE FRANKLIN DUNKINS, JR.,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

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December 15, 1983

QUESTIONS PRESENTED

1. Whether the Fifth, Sixth and Fourteenth Amendments to the United States Constitution require the suppression of Petitioner's post-arrest confession, obtained after Petitioner had invoked his right to consult counsel before further interrogation, where Petitioner did not knowingly, intelligently and voluntarily relinquish that right?

2. Where a prospective juror expressed personal scruples against the death penalty but allowed that if a crime was particularly atrocious the defendant "might need to die," was her subsequent exclusion from the jury venire violative of Petitioner's right to trial by an impartial jury guaranteed him by the Sixth and Fourteenth Amendments.

3. May a death sentence constitutionally be imposed under the Eighth and Fourteenth Amendments where the trial court failed, during the "guilt phase" of the trial, adequately to instruct the jury that it was permitted to find Petitioner guilty of a lesser included offense and that such lesser included offenses were not punishable by death under Alabama law?

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OPINIONS BELOW

The opinion of the Alabama Supreme Court below is reported at 437 So.2d 1356 (Ala. 1983) and is reproduced at App. 1-4 (pages 1-4 of the Appendix to this petition). The opinion of the Alabama Court of Criminal Appeals below is reported at 437 So.2d 1349 and is reproduced at App. 5-16.

JURISDICTION

The judgment of the Alabama Supreme Court below (App. 1-4) was entered on September 16, 1983. Rehearing was not sought. On November 8, 1983, this Court extended the time

for filing this petition for a writ of certiorari to and including December 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution of the United States, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Sixth Amendment to the Constitution of the United States, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

3. The Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

4. The Fourteenth Amendment to the Constitution of the

States, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5. The statute under which petitioner was prosecuted and convicted, Alabama Code § 13A-5-31(a)(3), 1975, which provides:

> (a) If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses.
>
> • • •
>
> (3) Rape when the victim is intentionally killed by the defendant; carnal knowledge of a girl under 12 years of age, or abuse of such girl in an attempt to have carnal knowledge, when the victim is intentionally killed by the defendant.

STATEMENT OF THE CASE

Following his conviction for the capital offense of "rape when the victim is intentionally killed" in violation of § 13A-5-31(a)(3), Code of Alabama, 1975, Petitioner was sentenced to death by electrocution by the Circuit Court of Jefferson County, Alabama. The conviction and sentence were affirmed both by the Alabama Court of Criminal Appeals (App. 5-16) and by the Alabama Supreme Court (App. 1-4).

How Federal Question is Presented

Following a lengthy hearing on Petitioner's motion to suppress the confession obtained from him by the State following

his arrest (R. 10-219), [1] the trial court held that the defendant "after having been properly apprised as to his constitutional rights intelligently and voluntarily waived such rights without coercion" and that Petitioner's confession was, therefore, admissible. (R. 219-220). Over the objection of defense counsel, Petitioner's confession was read to the jury. (R. 634-679). This issue was preserved on appeal in both the Alabama Court of Criminal Appeals and the Alabama Supreme Court; both courts affirmed the trial court's ruling on this issue. (App. 2-3; 6-10).

During the voir dire examination of the jury venire the trial court granted the State's challenge for cause of a prospective juror over the objection of Petitioner, on the ground that the prospective juror would automatically vote against imposition of the death penalty without regard to the evidence. (R. 411-412). Petitioner preserved this issue on appeal, and both the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed the trial court's ruling. (App. 2; 12-15).

Attempting to comply with this Court's rule in Beck v. Alabama, 447 U.S. 625 (1980) and with the subsequent, prophylactic opinion of the Alabama Supreme Court in Beck v. State, 396 So.2d 645 (Ala. 1981) the trial judge undertook to charge the jury that it was permitted to find Petitioner guilty of lesser included, non-capital offenses; however, his oral charge failed clearly to apprise the jury of the distinction between the capital offense and the non-capital offenses. (R. 1011-1014). The Alabama Court of Criminal Appeals held that both the conviction and sentence satisfied the requirements of Beck. (App. 15). The Alabama Supreme Court affirmed without expounding further on the Beck issue. (App. 2).

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[1] "R. ____" refers to the pagination of the record on appeal in both appellate courts below.

Statement of Facts

The facts material to the consideration of the questions presented herein may be concisely stated:

On the morning of May 27, 1980, Petitioner was taken into custody at his place of employment by Sheriff's deputies, who transported him, handcuffed, to the Jefferson County Court House along with a co-worker, who was not arrested. Once at the Sheriff's office, Petitioner was advised of his rights as required by Miranda v. Arizona, 384 U. S. 436 (1966); he did not clearly indicate that he understood. He was then interrogated by deputies about the rape and murder of Lynn McCurry. After only a few questions had been asked him, Petitioner advised the interrogating officer that he no longer wanted to talk to him, but that he wanted instead to talk to a lawyer. Petitioner was neither provided with a lawyer, nor offered the opportunity to contact one. The interrogating officer then continued to ask Petitioner additional questions, later characterized by the officer as "personal history questions," prior to termination of the interrogation.

Petitioner and his co-worker were then placed in a line-up. No identification was made, and both men were returned to their jobs. During the automobile trip back to their work site, however, one of the deputies continued a conversation with the co-worker which had begun back at the Sheriff's office regarding the possibility of the co-worker submitting to a polygraph test. The co-worker enthusiastically volunteered to take the test, proclaiming that it would prove his innocence. Neither of the detectives present could recall whether they asked Petitioner also to take a polygraph test or whether Petitioner merely volunteered himself. Nonetheless, the Petitioner agreed to submit to the test.

At 4:00 that afternoon the detectives went to Petitioner's home to talk with his parents. Within five minutes after they arrived, Petitioner came into the house, and the officers spent 15 or 20 minutes with Petitioner in which they "just kind of kidded around" with him; no further contact was had with Petitioner on this date.

The next morning, one of the deputies went to Petitioner's place of employment, pursuant to an arrangement he had worked out with the employer to come and talk to Petitioner on his job, and took Petitioner across the county to an office where a polygraph test was administered. No Miranda warning was read to Petitioner on this occasion, and on the return trip, the deputy asked several questions of Petitioner, such as his whereabouts on the night of the crime and was given the name of a woman named Brenda, whom Petitioner claimed to have been with most of that evening. The deputy testified that when he discharged Petitioner from his vehicle back at the work site, Petitioner offered to answer other questions, should the deputy desire.

At 5:30 p.m. that afternoon the deputy again went to Petitioner's home where he told Petitioner's father only that he wanted to ask Petitioner some additional questions. The father went into the house and brought Petitioner to the deputy, who took the Petitioner to Warrior, Alabama, City Hall, which was nearby. Unknown to Petitioner at this time was the fact that deputies had, at 5:14 p.m., concluded taking a confession from one Frank Marie Harris, who implicated Petitioner as the primary perpetrator and actor in the crime.

At 5:52 p.m. Petitioner was advised of his rights, and interrogation resumed. Although two tape recorders were available to officers at the time, no recording was made of what occurred between 5:52 p.m. and and 6:40 p.m., when Petitioner finally broke down and agreed to talk to them.

During this 48-minute period, however, several important things occurred. Petitioner continued to deny any knowledge of or involvement in the crime in the face of interrogation by a team of deputies. During the interrogation, the Chief of Police of Warrior, Alabama, came into the office and confronted Petitioner in an angry voice, saying that "I knew that he was involved and that I would prove it if it was the last thing I ever did."

Not long afterwards, Petitioner was told, for the first time, that Frank Marie Harris had "spilled the beans" and that he was blaming Petitioner as the main actor in the crime. At this point, Petitioner agreed to talk about the crime and asked only that one of the deputies who was a friend of Petitioner's family be present. When the deputy was in the room, Petitioner was again read his rights and the interrogators began taping his statement. At 6:44 p.m. Petitioner signed the rights waiver which was read to him since he could not read it himself, and he proceeded to admit his complicity in the crime.

At trial, during the voir dire examination of prospective jurors, several members of the jury venire expressed personal objections to the death penalty. The trial judge allowed further interrogation by counsel of these persons out of the presence of the main venire. After the questioning of one, Mrs. Mencer, the trial judge granted the State's challenge for cause on the basis of her personal opposition to capital punishment. The entire examination of Mrs. Mencer appears at R. 272-273 and 403-411, and reveals that while she was somewhat confused as to how she should answer the State's questions, her opinion was simply that life imprisonment without parole was a greater punishment than death. She clearly testified as follows, in response to the District Attorney's question:

MR. NAIL: . . .Outside of the limited circumstances Mr. Stovall gave you, whether you've either got to turn a heinous criminal loose or sentence him to die, is there any other circumstance where you could sentence someone to die for the commission of a criminal offense?

PJ MENCER: If given the alternative -- I'd say it like this: if given an alternative as to whether or not he could serve life imprisonment without parole, even I think I would not agree for them to be -- I would not want to see them paroled if they had committed an atrocious crime, then I might even say, well, then, you know, they might need to die. . . (R. 410). (Emph. supp.)

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant the Writ to Decide Whether Edwards v. Arizona Established a Per Se Rule Restricting The Circumstances Under Which the Right to Counsel Can Be Waived.

In Miranda v. Arizona, 384 U. S. 436 (1966), this Court held that the Fifth and Fourteenth Amendments required a State's custodial interrogation of an accused person to be preceded by a warning that the accused has the right to remain silent and also that he has the right to have an attorney present during such interrogation. This Court has characterized Miranda as creating a "rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogations cease." Fare v. Michael C., 442 U. S. 707 (1979). Moreover, this Court has long recognized that any waiver of this right must be made voluntarily, knowingly and intelligently. Johnson v. Zerbst, 304 U. S. 458, 464, (1938); Faretta v. California, 422 U. S. 806, 835 (1975); Fare, supra at 724-725.

In Edwards v. Arizona, 451 U. S. 477 (1981), the Court expanded Miranda in holding that once a suspect invokes his right to counsel, he may not be interrogated further, absent counsel, unless the suspect himself initiates dialogue with the authorities. Only last term, in Oregon v. Bradshaw, 459 U. S. ____, 103 S.Ct. 2830 (1983), the Court held, in a plurality opinion by Justice Rehnquist, that an accused need only demonstrate a "willingness and a desire for a generalized discussion about the investigation" in order to waive his right to the presence of counsel.

Justice Powell's concurring opinion in Bradshaw aptly articulates the confusion which has resulted from differing interpretations of Edwards, and expresses the need for clarification "as to whether Edwards announced a per se rule, and if so what rule." 103 S.Ct. at 2836.

To be sure, Justice Rehnquist's opinion is in marked contrast to the dissenting opinion of Justice Marshall, with three justices joining in each opinion. The Rehnquist opinion suggests that the Oregon court simply "misapprehended the test laid down in Edwards," stating:

> "We did not there hold that the 'initiation' of a conversation by a defendant such as respondent would amount to a waiver of a previously invoked right to counsel; we held that after the right to counsel had been asserted by an accused, further interrogation of the accused should not take place 'unless the accused himself initiates further communication, exchanges, or conversations with the police.' 451 U. S. at 485."

103 S.Ct. at 2834.

Justice Marshall's dissenting opinion, on the other hand, treats Edwards as having established a per se rule, extending Miranda, and providing that no interrogation can be made of an accused once the right to counsel is asserted unless the accused

person himself initiates a reopening of "communication or dialogue about the subject matter of the criminal investigation." 103 S.Ct. at 2839 (Emph. original).

Not only is there a virtually even split on this Court as to this issue, both the Federal Courts of Appeal and a number of State Supreme Courts are divided on this issue. See, f.n. 1 to Justice Powell's concurring opinion, supra, at 2836.

Such differences of opinion demonstrate clearly the need for clarification of this issue by this Court. The issue is not only vitally important to persons whose rights may be directly affected by application of the Edwards standards, as interpreted by Bradshaw, the resolution of the questions raised by this conflict are necessary to facilitate judicial development of the law in future cases.

II. Because Petitioner Neither Initiated Future Dialogue With Authorities and Because He Made No "Knowing and Voluntary Waiver of His Right To Counsel, His Conviction Was Violative Of the Fifth and Fourteenth Amendments.

Without regard to the existence, vel non, of a per se rule restricting a court from finding that an accused had waived his right to counsel, as described in the opening section of this petition, the Petitioner is entitled to relief because he was interrogated by the authorities after invoking his constitutional right to counsel, and without knowingly and voluntarily waiving those rights. Under Edwards, and even under Bradshaw, the State failed to prove that Petitioner waived his right to be free from a custodial interrogation without the presence of counsel, and also failed to prove that Petitioner "initiated" any further communication or dialogue with the authorities, even out of a desire for some "generalized discussion," as described in Bradshaw.

This Court should grant the petition for certiorari to

review this case because of the failure of the Alabama courts to apply properly the standards of Edwards, even as interpreted by Bradshaw.

As our Statement of Facts indicates, Petitioner was advised of his rights shortly after his arrest on May 27, 1983. Although he may not have entirely understood what was read to him, after questioning began, he told the interrogator that he did not want to talk any more, but that he wanted to talk to a lawyer. He was not provided with a lawyer, nor allowed to call one; some additional questioning continued.

Later that day, while still in custody, and with no evidence offered to prove a waiver, Petitioner agreed to take a polygraph test. While going to and from the polygraph test the following day, he was interrogated further about his whereabouts on the night of the crime. Although he had been released from custody prior to going to take the polygraph test, Petitioner effectively remained in custody, in a deputy's automobile; clearly, he was given no Miranda warning on the morning of the polygraph test. The deputy who questioned Petitioner used the information obtained from Petitioner to further the investigation and to confront Petitioner during later interrogation with the falsity of his alibi.

When Petitioner was again arrested on the afternoon of May 28th, he was then read a standard rights waiver; the record does not clearly reflect, as is the State's burden, even that he understood what was said to him. It is clear that at this time, 5:52 p. m., he did not waive any right to counsel he may have had. During the 48-minute period between the first reading of his Miranda rights and the taking of his confession, Petitioner was subjected to many of the tactics condemned in Miranda. He was confronted not only by interrogation about the crime, but also by the local chief of police, who angrily threatened to prove Petitioner's guilt "if it was the last thing I do."

He was confronted, if not taunted, by the fact that his co-defendant had confessed and was blaming the whole matter on Petitioner. He was confronted with the fruits of the deputies' investigation into his whereabouts on the night of the crime, based on information illegally obtained from Petitioner earlier in the day. All of these grounds were rejected as meritless by the Alabama courts, either passing them off as insignificant or emphasizing that Petitioner offered to answer additional questions. Of course, the offer to answer additional questions was made by Petitioner only after a deputy had lulled him into answering questions about his whereabouts on the night of the crime, and after the polygraph test had been administered.

That the Alabama courts did not treat these matters in the important light to which they were entitled is plainly and painfully evident. The Court of Appeal sloughed off the angry statement by the chief of police as being made only "in passing." The Alabama Supreme Court's distinction that the defendant in Edwards remained in custody and Petitioner was free for a period of time seems a distinction without a difference.

Both because of the clear violation of Petitioner's right to be free of interrogation without the presence of counsel on the mornings of May 27th and 28th, and because of the substantial questions regarding the conduct of the interrogation of the Petitioner on the afternoon and evening of May 28th, the Court should grant the writ prayed for.

III. The Exclusion from the Jury Venire Of Prospective Jurors Who May Express Even Strong Opposition to the Death Penalty is Unconstitutional Under the Sixth and Fourteenth Amendments Except On A Clear and Unmistakable Showing By The State That Such Jurors Would Automatically Vote Against Imposition Of Capital Punishment in Any Case.

In Witherspoon v. Illinois, 391 U. S. 510 (1968), this Court first held that a defendant's right to trial by an impartial jury in a capital case forbade the State from excluding prospective jurors merely because they had "voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Id., 522. Thus, Witherspoon laid down the well-recognized principle that

> ". . .[t]he most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings."

Id., n. 21.

So clear was this Court's opinion that little litigation, virtually none of significance, has followed it. The Alabama Courts in this case, however, apparently misunderstood the plain teaching of Witherspoon that in order for a potential juror to be excluded on the basis of an opposition to capital punishment, the juror must make it unmistakably clear that he or she is automatically opposed to the imposition of the penalty of death in any case or that the juror's attitude against the death penalty would prevent an impartial decision as to the guilt of the defendant.

Both the trial court and the Alabama Court of Criminal Appeals believed that prospective juror Mencer was unwilling to consider all of the penalties provided by state law and felt that she was irrevocably committed, before trial, to vote against the death penalty regardless of the facts and circumstances of the case.

Somewhat mechanically tracking the language of Witherspoon, the Court of Appeals concluded that Mencer was irrevocably committed to vote against the death penalty before the trial began, without regard to what the evidence might be in the trial. Although the Court of Appeals' opinion quotes from Mencer's testimony extensively, it fails to consider the crucial testimony that she believed there might be some circumstances where the defendant ought to die. (R. 410). Her response to the State's direct question regarding alternatives reveals that her preference was for life without parole, not because of any religious or sociological opposition to death, but because she considered life imprisonment a more severe penalty than death.

In order to sustain a challenge to a juror for his opposition to the death penalty, that juror must state "unambiguously that he would automatically vote against the imposition of capital punishment," and Mencer's statements are far from being unambiguous; at best, she is ambiguous about her reluctance to impose capital punishment. 2/ In Boulden v. Holman, 394 U. S. 483 (1969), a post-Witherspoon challenge to an Alabama statute eliminating prospective jurors from capital cases because of a "fixed opinion" about the death penalty, this Court reaffirmed Witherspoon and noted that a person with a fixed opinion against capital punishment or a person who does not believe in capital punishment "might nevertheless be perfectly able as a juror to abide by existing law -- to follow conscientiously the instructions of the trial judge and to consider fairly the imposition of the death sentence in a particular case." 394 U. S. at 484.

Because of the denial to Petitioner of critical rights guaranteed by the Sixth and Fourteenth Amendments, the writ should be granted.

2/ The record reveals that other prospective juror may have been erroneously challenged for cause for their objections to the death penalty. Unfortunately, these were not made the subject of any of the appellate proceedings below.

IV. A Death Sentence May Not Be Constitutionally Imposed Where a Trial Court Fails Adequately To Instruct The Jury That it was Permitted to Find Petitioner Guilty of Lesser Included, Non-capital Offenses Which Had Some Basis in the Evidence.

The trial judge herein attempted to instruct the jury as to each lesser non-capital offense included in the charge of "rape when the victim is intentionally killed" pursuant to the holding in Beck v. State, 396 So.2d 645 (Ala. 1981) (on remand from this Court), that from thence forward "juries in capital cases will be instructed on any lesser included offense which has any basis in the evidence." Id. at 658. The trial judge instructed the jury that rape in the first degree and murder were offenses to be considered by them as if set out in the indictment, however, in defining murder, he omitted the elements of felony-murder; that an instruction on felony-murder was warranted by the evidence cannot be seriously disputed. See Code of Alabama § 13A-6-2 (1965). Additionally, the instructions covering rape in the first degree and murder failed to delineate rape and murder as non-capital offenses for which the death penalty could not have been imposed. The jurors were admonished only that they should not consider the punishment aspect of any offense during that phase of their deliberations. Because the jury received instructions only as to some of the lesser included offenses available as a matter of law to Petitioner, and the instructions which were given failed to articulate the difference between capital and non-capital offense, the reliability of the guilt determination was diminished. Thus, Petitioner's conviction and sentencing were rendered unconstitutional under the Eighth and Fourteenth Amendments and Beck v. Alabama, 477 U. S. 625 (1980). Accordingly, the writ sought by Petitioner should be granted.

CONCLUSION

For all of the reasons stated in this petition, your Petitioner respectfully prays that the Court will grant him a Writ of Certiorari to the Supreme Court of Alabama.

Respectfully submitted,

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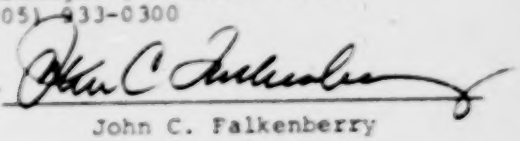
By 
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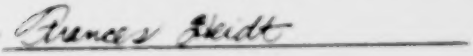
By 
Frances Heidt

December 15, 1983

Attorneys for Petitioner

APPENDIX

THE STATE OF ALABAMA - - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1983

Ex parte: Horace Franklin Dunkins, Jr.

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS

(Re: Horace Franklin Dunkins, Jr.

82-540 v.

State of Alabama)

PAULKNER, JUSTICE.

Horace Franklin Dunkins, Jr. was convicted of murder made capital when the victim is intentionally killed. Code of Alabama, § 13A-5-31(a)(3). On appeal the defendant raised three issues which he claimed entitled him to a new trial. The court of

Criminal Appeals thoroughly examined the defendant's arguments, found them to be without merit, and after independently determining that the death sentence was appropriate, affirmed his conviction and sentence.

In his petition to this court seeking a review of the decision of the Court of Criminal Appeals, Dunkins raised the same issues he had previously presented to the court below. They are:

(1) Whether the trial court erred in denying the defendant's motion to suppress his confession because it was obtained in violation of his fifth and fourteenth amendment rights.

(2) Whether the trial court erred in admitting the defendant's confession before the corpus delicti had been proven by the state.

(3) Whether the trial court erred in allowing a challenge for cause of a prospective juror.

In its opinion, Dunkins v. State, [Ms. 6 Div. 669, February 1, 1983] ___ So. 2d ___ (Ala. Civ. App. 1983), the Court of Criminal Appeals addressed each issue in detail, including the aggravating and mitigating circumstances, and we are of the opinion that it decided the issues correctly.

We do, however, wish to expand on that opinion regarding the petitioner's claim that his confession was obtained in violation of the fifth and fourteenth amendments. There are crucial factual distinctions between this case and Edwards v. Arizona, 451 U.S. 477 (1981), which the defendant cited as controlling. In both cases the defendants indicated during their initial questioning a desire to have an attorney present, whereupon questioning relating to the offense ceased. In Edwards the defendant remained in custody. The next morning when the guard came to his cell to take him to be questioned again he told the guard "that he did not want to talk to anyone." The guard

replied that "he had" to talk and took him to meet with detectives. During the meeting the defendant gave the confession in question. In this case Dunkins was released after the initial questioning. While he was being returned to his place of employment he volunteered to take a polygraph test. After taking the test, he told the police that "he would be willing to talk" and told them when he would be home that evening. Deputy House telephoned Dunkins that afternoon and Dunkins agreed to go to city hall and talk with House. After being informed that his co-defendant had implicated him, he indicated a desire to tell "his side of the story." Dunkins was not only read his Miranda rights, but was asked by House who he wanted present during the interview, to which Dunkins replied that he wanted Deputies House and Johnson present.

Edwards prohibits the police from further interrogation with respect to the offense after the accused requests that an attorney be present, "unless the accused himself initiates further communication, exchanges, or conversations with the police." Edwards, supra at 484-485. Unlike Edwards, who, while still in custody, was told "he had" to talk to the police, Dunkins, after being released, volunteered to take a polygraph test and to make himself available for questioning. In light of the evidence that Dunkins volunteered to be questioned, made an oral and written waiver of his constitutional rights, and specified who he wanted present when he made the statement, we cannot agree that his motion to suppress the confession should have been granted.

Without reiterating those facts leading us to the conclusion that the offense was particularly nefarious, we also agree with the finding of the courts below that the evidence overwhelmingly supported the conclusion that the crime was "especially heinous, atrocious, or cruel," Code of Alabama, § 13A-5-35(8) (1975), and that the aggravating circumstances outweighed any mitigating

factors.

Having considered the petition, the briefs, and the opinion of the Court of Criminal Apepals, we are of the opinion that the judgment of the Court of Criminal Appeals, which upheld Dunkins's conviction and death sentence, is due to be, and it hereby is, affirmed.

AFFIRMED.

Torbert, C.J., Maddox, Jones, Almon, Shores, Embry, Beatty and Adams, JJ., concur.

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1982-83

6 Div. 669

Horace Franklin Dunkins, Jr.

v

State

Appeal from Jefferson Circuit Court

BOWEN, JUDGE

The defendant was indicted for the capital offense of "rape when the victim is intentionally killed" in violation of Alabama Code Section 13A-5-31(a)(3) (1975). A jury found him guilty of "the capital offense as charged in the indictment."

a separate sentencing hearing was held and the jury fixed the defendant's punishment at death. The trial court then held a separate hearing as required by Alabama Code Sections 13A-5-32 and-33 (1975), adjudged the defendant guilty of the capital offense as charged in the indictment, and fixed his sentence at death. Three issues are argued on appeal.

I

The defendant contends that his Fifth Amendment rights were violated when he was subjected to police questioning after requesting counsel. He argues that Edwards v. Arizona, 451 U.S. 477 (1981), is controlling. Edwards followed the holding of Miranda v. Arizona, 384 U.S. 436 (1966), that if the accused requests counsel, "the interrogation must cease until an attorney is present." Miranda, 384 U.S. at 474.

> "(W)e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchange or conversations with the police."
> Edwards, 451 U.S. at ____.

The crime was committed sometime during the night of Monday, May the 26th or the early morning of May the 27th. The defendant and Ernest Jackson were taken into custody by Deputy Sheriff James Earl Smith a little after 9:00 A.M. on the 27th and transported from Alabama Wire Company, where they were employed, to the Jefferson County Sheriff's Office. The defendant was fully advised of his constitutional rights under Miranda v. Arizona, supra, and made a voluntary, knowing and intelligent waiver.

Sergeant Smith then asked the defendant "some questions about some of his personal history and he said he didn't want to

App. 1a

talk to no one, wanted to talk to a lawyer." Smith asked, "In other words you don't want to talk to me any more, is that correct?" The defendant replied, "No" and Smith concluded the statement at 10:00 A.M. without asking any additional questions. The record indicates that defendant answered a few of Sergeant Smith's questions and then said, "Before I talk any more now I would like to talk to my lawyer, or either my mama or somebody, I'm run down at this place." After the defendant said this, Sergeant Smith asked him some "personal history questions" concerning his age, height, weight, name, address and phone number.

After the request for counsel, the defendant was not questioned about the murder. The interview began at 9:49 A.M. and ended at 10:00 A.M.

After the questioning stopped, the defendant was told that he was going to be placed in a lineup and that if he could not be identified he would be taken back to work. The defendant was not identified, was released from custody and was taken back to his place of work around noon.

On the way back to Alabama Wire Company, Jackson volunteered to take a polygraph test. The defendant also agreed to do the same. The next day, May 28th, Deputy Sheriff Fred House picked up the defendant and Jackson at the Alabama Wire Company and took them to the Sheriff's Office to take the polygraph. After the test, both the defendant and Jackson were taken back to the Wire Company. Deputy House testified that on the way back to the company, the defendant told him that "he would be willing to talk with me more if I wanted him to, and what time he would get off that evening and he would be home if I needed to talk to him more."

Deputies Smith and House talked with the defendant's parents around 4:00 that afternoon. During the conversation, the defendant arrived and remained present but was not questioned.

About two or three hours later that afternoon, Deputy House telephoned the defendant at home and told him he needed to talk to him. The defendant agreed to go to City Hall with Deputy House. There, the record shows, the defendant was repeatedly advised of his Miranda rights and made both an oral and a written waiver of his constitutional rights.

Roger Dale Beam, Chief of Police of Warrior, told the defendant that Frank Marie Harris had given a statement implicating the defendant, that Beam knew the defendant was involved and would prove it if it was the last thing he ever did. The Chief was in the same room with the defendant for no more than a minute and a half and made this statement as they "were passing".

Deputy House told the defendant that he was being arrested for rape and murder. After House informed the defendant of the evidence against him, including the statement given by Harris, the defendant confessed and admitted his participation in the crime. Before the defendant told his "side of the story", Deputy House asked him whom he wanted present during the interview and the defendant stated that he wanted House and Deputy Carl Johnson present. With these officers present, the defendant then admitted his involvement.

The substance and intent of Edwards were not violated. After the defendant requested counsel all questioning concerning the facts of the case ceased. The defendant's constitutional rights were not violated by the fact that Deputy Smith sought biographical information from the defendant after the defendant had requested counsel. Varner v. State, 418 So.2d 961, 962 (Ala.Crim.App. 1982). Miranda does not erect "an absolute per se bar on any conversation with the accused by investigating officers after the former has requested counsel. It only inhibits investigative interrogation related to the specific crime itself." United States v. Grant, 549 F.2d 942, 946 (4th Cir.), cert. denied, 432 U.S. 908 (1977).

After the defendant was not identified in a lineup, he was released from custody and remained free for more than twenty-four hours. Sometime during that time he indicated to the police that he would be willing to talk to them. This is just the opposite of the facts in Edwards where Edwards, after having requested to see counsel, was told that "he had" to talk to the police. This case is clearly distinguishable from Edwards because of the critical facts that the defendant was released from custody after he requested counsel and that he expressed a complete willingness to talk with Deputy House. Swint v. State, 409 So.2d 992 (Ala.Crim.App. 1982); Warrick v. State, 409 So.2d 984 (Ala.Crim.App. 1982).

In this case we have both express and explicit oral and written waivers of Miranda. North Carolina v. Butler, 441 U.S. 369, 375-76 (1979) (Although a Miranda waiver must be made specifically, it need not be express but may be inferred from the circumstances).

Confrontation with a co-defendant's confession is not necessarily an unfair tactic or unlawfully coercive. Gibson v. State, 347 So.2d 576, 582 (Ala.Crim.App. 1977). That the defendant's statement was motivated by his feeling of revenge against Harris and induced by his desire to see Harris prosecuted for the murder and rape does not render his statement involuntary. Moore v. State, 415 So.2d 1210, 1214 (Ala.Crim.App. 1981); Oliver v. State, 399 So.2d 941, 945 (Ala.Crim.App. 1981).

Clearly, a confession induced by a threat that the accused will be prosecuted unless he confesses will render any statement or confession involuntary and inadmissible in evidence. Hinshaw v. State, 398 So.2d 762 (Ala.Crim.App.), cert. denied, 398 So.2d 766 (Ala. 1981). We do not consider Chief Beam's statement that he would prove that the defendant "did it" as a threat in order to get the defendant to confess. We find no express or implied threat in Chief Beam's statement that the defendant would be prosecuted unless he confessed.

Threatening the defendant with prosecution if he does not confess is not the same as confronting an accused with evidence of his guilt. From the record, it appears that the law enforcement officers were totally candid in their dealings with the defendant. The statements made and the attending circumstances were not calculated to delude the defendant as to his true position, or exert improper and undue influence over his mind. There was no fraud, trickery, or subterfuge employed. 99 A.L.R.2d 772 (1965). The record supports no inference of pretense, artifice or deception. To the contrary, the record shows that the law enforcement officers were honest and straightforward in confronting the defendant with the case they had against him.

We have thoroughly reviewed the totality of the circumstances surrounding both statements given by the defendant, including the facts that he was nineteen years old and almost illiterate. Our assessment of these facts convinces us that both statements were completely voluntarily given after a knowing and intelligent waiver of constitutional rights.

II

We cannot accept the defendant's contention that the corpus delicti of the capital offense charged in the indictment was not proven because the State failed to prove rape or attempted rape.

It is true, as the defendant argues, that there was no physical evidence of rape presented. Because of the quantity of blood present, tests of the victim's body cavities did not reveal the presence of seminal fluid. However, the circumstantial evidence affords satisfactory proof of the corpus delicti. A small area on the front of the defendant's undershorts was stained with human blood.

Michael Beckham was with the defendant and Frank Harris on the afternoon of May 26th. He heard the defendant tell Harris, "I'm going to get some pussy from a white lady"

and Harris responded, "Yeah, I'm with you Horace." At the defendant's request, Beckham purchased the tape that was later used to bind the victim's wrists.

The victim was found tied to a tree with sixty-six stab wounds "over multiple body surfaces, including the chest, the abdomen, the upper legs, both back and front, and also in the personal region." The victim was naked except for a night-gown or negligee which was wrapped over her head.

In addition to a stab wound which penetrated the vaginal vault, there were lacerations of the vagina. Jay Glass, Chief Medical Investigator of the Office of the Coroner - Medical Examiner of Jefferson County, testified that lacerations mean "a tearing injury, tearing of tissue." There were also lacerations of the rectum.

What this Court said in Watters v. State, 369 So.2d 1262 (Ala.Crim.App. 1978), reversed on other grounds, 369 So.2d 1272 (Ala. 1979), another capital case, applies here. There the appellant argued that the only evidence of any attempted robbery in a prosecution for attempted robbery when the victim is intentionally killed was supplied by the confession, and that there was no independent, probative evidence to corroborate the confession. We held:

> "It is a settled principle of law that a mere extrajudicial confession, uncorroborated by other facts, is insufficient to show the corpus delicti and cannot support a conviction. Matthews v. State, 55 Ala. 187, 28 Am.Rep. 698 (1876); Reynolds v. State, Ala.Cr.App., 346 So.2d 979, cert. denied, Ala., 346 So.2d 986 (1977). However, it is equally as settled that inconclusive facts and circumstances tending prima facie to show the corpus delicti may be aided by the admissions or confession of the accused so as to satisfy the jury beyond a reasonable doubt, and so to support a conviction, although such facts and circumstances, standing alone, would not thus satisfy the jury of the existence of the corpus delicti. Hill v. State, 207 Ala. 444, 93 So. 460 (1922); Bryant v. State, 33 Ala.App. 346, 33 So.2d 402 (1948).
>
> "Circumstantial evidence may afford satisfactory proof of the corpus delicti.

> The presentation of facts, from which the jury may reasonably infer that the crime charged was committed, requires the submission of such question to the jury. Johnson v. State, 247 Ala. 271, 24 So.2d 17 (1946); Taylor v. State, 276 Ala. 232, 160 So.2d 641 (1964). Reasonable inferences may furnish a basis for proof beyond a reasonable doubt. Royals v. State, 36 Ala.App. 11, 56 So.2d 363, cert. denied, 256 Ala. 390, 56 So.2d 368 (1952).
>
> "The facts in this case and the legal inferences springing from them fully support and corroborate the appellant's confession. The evidence is therefore sufficient to support a conviction." Watters, 369 So.2d at 1271-72.

Under those principles set forth in Dolvin v. State, 391 So.2d 133 (Ala. 1979), and Cumbo v. State, 368 So.2d 871 (Ala.Crim.App. 1978), cert. denied, 368 So.2d 877 (Ala. 1979), there was evidence from which the jury might reasonably conclude that the evidence and all reasonable inferences therefrom excluded every reasonable hypothesis other than guilt and proof of the corpus delicti of rape.

The corpus delicti of a crime need not be shown by evidence "wholly independent of the relation of the accused to the offense charged. The evidence that defendant committed the crime may be so inextricably blended with proof of the corpus delicti as to make a separation impossible." DeSilvey v. State, 245 Ala. 163, 165, 16 So.2d 183 (1944).

Any error in the failure to prove the corpus delicti prior to the introduction of a confession is cured by subsequent proof of the corpus delicti. Phillips v. State, 248 Ala. 510, 517, 28 So.2d 542 (1946); Cooley v. State, 233 Ala. 407, 409, 171 So. 725 (1937).

III

Prospective juror Mencer was properly excluded for cause because she made it unmistakably clear that she would automatically vote against the death penalty regardless of the evidence. Ms. Mencer was questioned by the State, the defendant and the trial court. She repeatedly and consistently made it

clear that she would automatically vote against the death penalty in favor of life imprisonment without parole regardless of the evidence because "to die would be the easy way out."

> "I feel that anybody who commits a crime should be punished even if it's my son, and I only have the one. However, I do not feel that death is the answer. I feel that if I take a life, an eye for an eye is not the answer. I feel that I need to know the feeling. I need to feel it. And the only way I can feel it is to live, eventually live, with my conscience, live with the thought that I have committed this act or this crime. So that I feel to suffer behind bars is a much greater punishment than death. I look at death as being the same as being asleep. And when I'm asleep, I don't know anything about what I've done. I mean I'm at peace - - let me say it that way - - I'm at peace. But if I have to face day in and day out behind bars and I know that I'm not going to be paroled, or the other person, I feel that's worse than dying."
>
> • • •
>
> "Under no circumstances would I want them to get out that lightly (with life without parole). And that's what I'm saying. I feel that if they have committed a crime, then they should not die, because that is too easy."

Under questioning by the trial judge, Ms. Mencer indicated unequivocally and positively that even if convinced beyond a reasonable doubt and to a moral certainty of the defendant's guilt she could not fix punishment at death and she could not conceive in her own mind of any circumstance, even if convinced of the defendant's guilt, where she would fix punishment at death if that were one of the available or alternative punishments.

Witherspoon v. Illinois, 391 U.S. 510, 522-23 (1968), made it clear that a prospective juror may properly be excluded for cause where he "would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case." (Emphasis in original). See also Adams v. Texas, 448 U.S. 38 (1980); Annot., 39 A.L.R.3d 550 (1971). Witherspoon does not compel any inquiry into the

subjective reasons why a prospective juror is irrevocably committed to vote against the death penalty. Such an inquiry is, in fact, irrelevant to the very purpose of Witherspoon, which is to produce a fair and impartial jury.

> "The right under the Sixth and Fourteenth Amendments to trial by a jury guarantees to the criminally accused 'a fair trial by a panel of impartial, "indifferent" jurors.' Irvin v. Dowd, supra, 366 U.S. at 722, 81 S.Ct. at 1642. Accord, e.g., Murphy v. Florida, 421 U.S. 794, 799, 95 S.Ct. 2031, 2036, 44 L.Ed.2d 589 (1975). But the state also enjoys the right to an impartial jury, Williams v. Wainwright, supra, 427 F.2d at 923, and impartiality requires not only freedom from jury bias against the accused and for the prosecution, but freedom from jury bias for the accused and against the prosecution. Hayes v. Missouri, 120 U.S. 68, 70-71, 7 S.Ct. 350, 351, 30 L.Ed. 578 (1887). See Comment, 21 Vand.L. Rev. 864, 865 (1968)."
> Spinkellink v. Wainwright, 578 F.2d 582, 596 (5th Cir. 1978).

"Coexisting with the petitioner's right to an impartial jury, after all, is the State's right to have a jury that is willing to consider all the penalties prescribed by law."

Williams v. Maggio, 679 F.2d 381, 385 (1982).

> "All veniremen are potentially biased. The process of voir dire is designed to cull from the venire persons who demonstrate that they cannot be fair to either side of the case. Clearly, the extremes must be eliminated - i.e., those who, in spite of the evidence, would automatically vote to convict or impose the death penalty or automatically vote to acquit or impose a life sentence. The guarantee of impartiality cannot mean that the state has a right to present its case to the jury most likely to return a verdict of guilt, nor can it mean that the accused has a right to present his case to the jury most likely to acquit. But the converse is also true. The guarantee cannot mean that the state must present its case to the jury least likely to convict or impose the death penalty, nor that the defense must present its case to the jury least likely to find him innocent or vote for life imprisonment."
> Smith v. Balkcom, 660 F.2d 573, 578-79 (5th Cir. 1981) (emphasis in original), modified on unrelated point, 671 F.2d 858 (1982).

Here, Ms. Mencer indicated that she was unwilling to consider all of the penalties provided by state law, and that she was irrevocably committed, before the trial began, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings and even if convinced of the defendant's guilt of the crime charged beyond any reasonable doubt and to a moral certainty. Therefore, she was properly excused for cause. This is exactly what Witherspoon requires. 391 U.S. at 522, n. 21.

IV

As required, Beck v. State, 396 So.2d 645, 664 (Ala. 1981), this Court has examined this particular death sentence in light of the standards and procedure approved in Gregg v. Georgia, 428 U.S. 153 (1976). The defendant was indicted and convicted for a crime that is, in fact, properly punishable by death. We take judicial knowledge that similar crimes throughout the state are being punished capitally. The defendant's accomplice, Frank Marie Harris, pled guilty and received life imprisonment.

The trial judge specifically found, and we agree, that the death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. The evidence overwhelmingly supports the finding of the statutory aggravating circumstance that the capital offense was especially heinous, atrocious, or cruel. Kyzer v. State, 399 So.2d 330, 333-34 (Ala. 1981); Alabama Code Section 13A-5-35(8) (1975). The trial judge specifically found (and all the evidence supports that finding) that the victim "was alive at the time she was stabbed sixty-six times." The aggravating circumstances (Sections 13A-5-35(4) and (8)) far outweigh the mitigating circumstances (the defendant's age (19))and the fact that he had no significant history of prior criminal activity[1].

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1. The defendant had been previously charged with rape in an unrelated case, but was acquitted. The trial judge, properly, did not consider that charge to negate the Section 13A-5-31(1) mitigating circumstance. See Cook v. State, 369 So.2d 1251,

Because the aggravating circumstances remarkably and exceedingly outweigh the mitigating circumstances, this Court concurs in and affirms the findings of the jury and the trial court that death is the appropriate sentence. Indeed, applying the laws of this state and nation to the particular facts of this case, we do not see how any other penalty is justified. The judgment of the circuit court is affirmed.

AFFIRMED.

All Judges Concur.

NO. 83-5939

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HORACE FRANKLIN DUNKINS, JR.,

Petitioner,

v.

STATE OF ALABAMA,

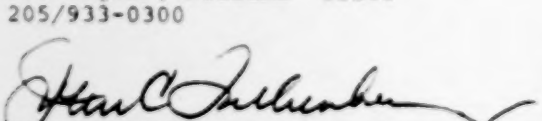
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Horace Franklin Dunkins, Jr., who is now confined on death row at the Alabama State Prison known as Holman Unit, asks leave to file the attached Petition for a Writ of Certiorari to the Alabama Supreme Court without the prepayment of costs or the giving of security for costs, and to proceed in forma pauperis herein, pursuant to Rule 46 of the Rules of this Court. The affidavit of counsel is offered in support of this motion and the affidavit of the petitioner will be submitted to the Court promptly upon receipt of such affidavit by counsel.

Respectfully submitted,

STEWART, FALKENBERRY & WHATLEY
2100 16th Avenue South, Suite 305
Birmingham, Alabama 35205
205/933-0300

By 
John C. Falkenberry

Attorneys for Petitioner

NO. 83-5939

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HORACE FRANKLIN DUNKINS, JR.,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

A F F I D A V I T

STATE OF ALABAMA)

JEFFERSON COUNTY)

Before me, the undersigned authority in and for said County and State, personally appeared John C. Falkenberry, who first being duly sworn, deposes and says as follows:

1. I am a member of the Bar of this Court and I am counsel to Horace Franklin Dunkins, Jr., who seeks to file a petition for a writ of certiorari in this Court, and I make this affidavit in support of Mr. Dunkins' motion for leave to proceed in forma pauperis herein. My representation of Mr. Dunkins is without remuneration.

2. Mr. Dunkins is presently in the custody of the State of Alabama and is not immediately available to execute an in forma pauperis affidavit. However, an affidavit has been sent to Mr. Dunkins by me which will be filed with this Court as soon as it has been returned to me. A copy of that affidavit is attached.

3. Mr. Dunkins has had appointed counsel to represent him both in the trial and appellate stages of his case.

4. I am informed and believe that because of his poverty, Mr. Dunkins is unable to pay for the costs of this cause or to give security for same.

5. I believe that Mr. Dunkins is entitled to redress in this cause for the reasons stated in the petition for a writ of certiorari, which is filed contemporaneously herewith.

John C. Falkenberry

Sworn to and subscribed before me on this the 12th day of December, 1983.

Notary Public

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HORACE FRANKLIN DUNKINS, JR.,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

A F F I D A V I T

STATE OF ALABAMA)

ESCAMBIA COUNTY)

I, Horace Franklin Dunkins, Jr., being duly sworn, deposed and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the Petitioner in the above styled case.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income or earnings.

3. I am unable to give security for costs and expenses of this case.

4. Counsel is serving on my behalf without remuneration on my present petition for a writ of certiorari.

5. I believe that I am entitled to the redress I seek in this cause.

_____
Horace Franklin Dunkins, Jr.

Sworn and subscribed before me on this _____ day of December, 1983.

_____
Notary Public

NO. 83-5939

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HORACE FRANKLIN DUNKINS, JR.,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

AFFIDAVIT IN SUPPORT OF
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF ALABAMA)

JEFFERSON COUNTY)

I, Horace Franklin Dunkins, being first duly sworn according to law, depose and say that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes [ ] No [✓].

(a) If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____
_____.

(b) If the answer is no, state the date of your last employment and the amount of salary and wages per month you received. In 1974 the Month of March. $676 per Month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source? Yes [ ] No [✓].

(a) If the answer is yes, describe each source of income and state the amount received from each during the last twelve months. _____.

3. Do you own any cash or checking or savings accounts (include money in prison account)? Yes[ ] No[✓].

(a) If the answer is yes, state the total value of the items owned. _____.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)? Yes [ ] No[✓].

(a) If the answer is yes, describe the property and state its approximate value. _____.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None at this _____.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Further, deponent saith not.

Horace Franklin Dunkins, Jr.

Sworn to and subscribed before me on this the 27 day of January, 1984.

Notary Public 4-3-85